OEDCA DIGEST

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SUMMARIES OF SELECTED DECISIONS ISSUED BY THE OFFICE OF EMPLOYMENT DISCRIMINATION COMPLAINT ADJUDICATION

FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final agency decision on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include the prima facie case in age discrimination claims, national origin discrimination, the *prima facie* case in reprisal claims, "pretext" in reprisal claims, reasonable accommodation, sexual harassment, procedural dismissal of harassment claims, and the improper use of facility EEO managers.

Also included in this issue is a summary of recent EEOC guidance for food service employers regarding compliance with *The Americans with Disabilities Act.*

The *OEDCA DIGEST* is now available on the internet at: http://www.va.gov/orm/newsevents.htm.

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I

THREE-YEAR AGE DIFFERENCE NOT SIGNIFICANT ENOUGH TO CREATE INFERENCE OF AGE DISCRIMINATION

Absent direct evidence of discriminatory motive, a complainant must generally satisfy a threshold burden known as a *prima facie* case when trying to prove a claim of disparate treatment. Establishing a *prima facie* case does not prove that discrimination occurred. Instead, it is simply enough evidence such that, if not rebutted by the employer, a trier of fact could reasonably conclude that unlawful discrimination did occur. The question presented in the following age discrimination claim was how great of an age difference was needed to establish a *prima facie* case.

The complainant was 46 years old Mail Clerk when he applied but was not selected for the position of Supply Technician. He was found qualified for the position by an HR specialist, but was not given an interview by the selecting official. He later learned that a 43-year old applicant was chosen. He filed a discrimination complaint alleging, among other things, that his age was a factor in his non-selection.

After reviewing the investigative file, an EEOC judge ruled in favor of the VA, finding no evidence of age discrimination. In particular, the judge found that the complainant was not even able to satisfy his threshold burden of establishing a *prima facie* case, as the age difference between him and the person selected was only three years. Citing to a Supreme Court case on the subject, the judge noted that to prove a *prima facie* case, a complainant must show, among other things, that a "significantly younger" person was favored. The judge concluded that a three-year difference was not significant enough to create the inference of age discrimination necessary for establishing a *prima facie* case.

Even assuming for the sake of argument that the complainant had established a *prima facie* case, the judge found that management articulated valid, nondiscriminatory reasons for not choosing the complainant, and the complainant was unable to offer any evidence that those reasons were a pretext for age discrimination.

The Equal Employment Opportunity Commission and the courts have not been consistent in defining the term "significantly younger." While there is no "bright-line" rule, the Commission has generally considered anything in excess of five years as significant.

II

DENIAL OF AWARD DUE TO EMPLOYEE'S NATIONAL ORIGIN

OEDCA recently accepted an EEOC administrative judge's decision finding national origin discrimination in con-

nection with the initial denial of a special contribution award to a Hispanic employee.

The employee (hereinafter "complainant") a painter in the Maintenance Section, was the only Hispanic employee in his section and the only employee not nominated for an award. Management officials testified that they did not nominate him initially because he had not accomplished anything "extraordinary" during the relevant time frame, and that he simply "did his job." The complainant countered this assertion by stating that the same was true for the other employees -- all Caucasian -- who received awards. After he filed an EEO complaint, management reconsidered and gave him an award.

Based on a review of the evidence of record, the EEOC judge concluded that a preponderance of the evidence pointed to a discriminatory motive for the initial denial. For example, the responsible management official admitted in his testimony that he frequently told jokes that disparaged minorities. Moreover, a review of the written award nominations for the other employees in his section failed to indicate work or accomplishments of such an "extraordinary" nature that a special contribution was clearly warranted. It appeared that, like the complainant, they were simply "doing their job."

The lesson here is obvious, yet one that is often overlooked by supervisors and managers. Decisions regarding awards should be carefully considered, and the rationale for any distinctions should be articulated in writing. The articulation should be specific, with clear examples that would justify the distinctions.

In this case, the official responsible for the awards simply used "boilerplate" language (*i.e.*, the same comments for everyone) to justify the special contribution awards. While this was certainly the easy way to do it, the official, to his dismay for sure, ultimately had to spend a lot more time and effort dealing with the ensuing EEO complaint.

III

COMPLAINANT FAILS TO ESTABLISH A "PRIMA FACIE" CASE OF REPRISAL

As in cases of disparate treatment, a complainant who alleges retaliation (aka "reprisal") must first establish a *prima facie* case; *i.e.,* enough evidence that, if not rebutted by the employer, a trier of fact could reasonably conclude that unlawful retaliation because of prior EEO activity did occur.

Establishing a *prima facie* case of retaliation is generally not difficult, but neither is it automatic. Usually, a complainant must present evidence of (1) prior EEO activity, such as participation in the EEO complaint process, or some other form of opposition to

prohibited discrimination, (2) adverse treatment, (3) awareness of the prior EEO activity by the official responsible for the adverse treatment, and (4) a causal connection between the prior EEO activity and the adverse treatment. Proof of the fourth element may come from comparative evidence concerning other employees. In most cases, however, all that is needed to satisfy this element is a short time frame between the prior EEO activity and the adverse treatment. The question presented in the following case was whether the complainant was able to satisfy these four elements of proof.

The complainant presented evidence that she had engaged in EEO activity in 1994 by filing an EEO complaint, and that a settlement of the complaint was reached in that same year. She further demonstrated that five years later, in 1999, she experienced adverse treatment when she was blamed for many of the problems in her section, and she was assigned higher-level duties without a corresponding increase in grade, which in turn caused her to be ineligible to apply for certain higher-level positions.

The above evidence was sufficient to establish the first and second elements of her *prima facie* case of retaliation. As for the third element, however, she was unable to show that the management official responsible for the adverse treatment was aware of her prior EEO complaint, which involved a different supervisor. Without such knowledge by the responsible official, there was not enough evidence to raise an inference of retaliatory motivation.

Moreover, the complainant failed to present evidence regarding the fourth element – a causal connection between the adverse treatment and the prior EEO activity. Because of the five-year time frame between her prior EEO complaint and the matters complained of, she was again unable to raise an inference of retaliation.

The EEOC has generally ruled that the passage of more than 12 months between protected activity and adverse treatment will defeat a *prima facie* case, although some courts have favored an even shorter period. The rationale for requiring a short time frame is that the more time that passes, the less likely it is that an individual will harbor a desire to retaliate.

Keep in mind that if the prior EEO activity involves filing an EEO complaint, the time frame is often measured not from the time the prior complaint was filed, but from when the processing of it was completed. In this case, the prior complaint was filed and settled in 1994, five years before the adverse treatment. If the complaint had not been settled and was still pending five years later, the complainant may have been able to satisfy this element of proof.

Also keep in mind that establishing a

prima facie case does not mean that the complainant wins his or her case. If management is able to articulate a legitimate, nonretaliatory reason for the adverse treatment, the complainant must still prove by a preponderance of the evidence that the articulated reason is a pretext; *i.e.*, that it is false. On the other hand, if management is unable to articulate a legitimate reason for its actions, then the evidence used to establish the *prima facie* case, by itself, will suffice and the complainant will prevail.

IV

REASON GIVEN FOR REPRIMAND FOUND TO BE A PRETEXT FOR RETALIATION

As noted above, even if a complainant presents enough evidence to establish a *prima facie* case, such evidence, by itself, will usually not be enough for a complainant to prevail on his or her complaint. To win, a complainant, in addition to presenting a *prima facie* case, must also prove by a preponderance of the evidence that the employer's explanation for what happened is a pretext; *i.e.*, is not the true reason. The following case shows how one employee was able to demonstrate pretext.

The complainant filed his initial EEO complaint in January. His supervisor (hereinafter referred to as responsible management official, or "RMO") was aware that he had filed the complaint, as she was one of the responsible officials named therein. Six months later, an EEO investigator interviewed the RMO concerning the allegations in the complaint. Six days after the interview of the RMO, the complainant was involved in an incident for which he received a written reprimand following an investigation into the incident, which was conducted by the RMO. Prior to this time, the complainant had never been disciplined. The complainant filed a second complaint alleging that the RMO issued the reprimand in retaliation for his first complaint against her.

The complainant clearly established a *prima facie* case. He had previously engaged in EEO activity, the RMO was aware of that activity, the RMO subjected him to unfavorable treatment by issuing the reprimand, and the reprimand was issued within such a short period of time after the protected activity (six months after he filed his initial complaint and three months after the interview of the RMO) that a retaliatory motivation may be inferred.

The RMO's explanation for issuing the reprimand was that several witnesses reported to her that the complainant, a nursing assistant, had engaged in inappropriate behavior; -- *i.e.*, allowing a female nursing assistant to sit on his lap in a patient's room in the presence of the patient. In addition, she stated that the complainant had engaged in an unspecified act of "patient abuse."
In order to prevail, the complainant

had to prove by preponderant evidence that the reason articulated was not the real reason for the reprimand. He managed to do so by showing that the RMO had relied on statements that did not actually prove convincingly that he had intentionally allowed a female nursing assistant to sit in his lap.

According to the complainant, the incident was an accident. The female nursing assistant had tripped near the complainant as she was entering the patient's room, landed in the chair in which he was seated, and then immediately stood back up.

The witness statements do not refute the complainant's version of the event. One witness stated that while she momentarily saw the female assistant in the complainant's lap as she was passing by the patient's room, she later learned from the assistant that she [the assistant] had tripped near the complainant and had reached for him to stop her fall. The witness accepted that explanation as not necessarily inconsistent with what she had briefly seen as she was passing by the room.

Another witness, who at the time was in the room feeding a patient, did not see anything, but heard someone say, "[W]hat – are you trying to trip me?" This was also not necessarily inconsistent with the version related by the complainant and the female assistant.

The RMO also relied on a statement that she wrote for the patient in question, because the patient, a quadriplegic, is unable to write. In it the RMO quotes the patient as telling her that he saw the assistant "leave" the complainant's lap. The statement does not mention how she got there. Again, this statement was not necessarily inconsistent with the complainant's version of the event.

Finally, there was no evidence in the record to support the RMO's assertion that the complainant had engaged in patient abuse, and the RMO under cross-examination was unable to offer any specific examples of such abuse.

Given the above facts, OEDCA agreed with an EEOC judge's conclusion that the complainant had demonstrated by preponderant evidence that the RMO's reason for issuing the reprimand was a pretext to hide a retaliatory motivation.

V

VA UNABLE TO ACCOMMODATE EMPLOYEE'S LATEX ALLERGY

The complainant, a Licensed Practical Nurse (LPN), has a severe allergy to latex, which precludes her from using latex gloves and masks. Contact with latex-based products causes swelling and redness of the eyes. It also results in redness, swelling, and cuts on her hands. These conditions substantially limit her ability to see, to use her

hands, and limited ability to work in the field of nursing.

In response to her request for reasonable accommodation, management gave her non-latex gloves and masks to use. After she continued to have the same allergic reactions even when using the non-latex materials, management determined, and the complainant agreed, that she could no longer work in areas where direct patient care is delivered.

In a further attempt to accommodate her, management reassigned her to light duty work in the Social Work Service, and later to a Home-Based Health Care unit physically located outside of the Medical Center, hoping that her removal from direct patient care areas in the hospital would eliminate or greatly alleviate her allergic reactions. The reactions continued, however, even during the HBHC assignment, as she was required to walk through the hospital on a daily basis.

The complainant's physician warned that her allergy was so severe that she could suffer an anaphylactic reaction from continued exposure to allergens in the hospital. Because of these continued reactions, she retired on disability and shortly thereafter filed a disability discrimination claim alleging, among other things, that management failed to make reasonable efforts to reassign her.

After reviewing the evidence of record, OEDCA concluded that the complainant was an individual with a disability, as her medical condition substantially limited some of her major life activities, including working as a nurse. However, OEDCA also concluded that management made reasonable, albeit unsuccessful, attempts to accommodate her condition, including complying with the legal requirement that it consider reassignment. Despite two reassignments, she continued to suffer allergic reactions simply by walking through the hospital. Hence, management was justified in concluding that her disability posed a direct threat to her health and that there was no other possible accommodation that would either eliminate that risk or reduce it to an acceptable level.

This case highlights an important reasonable accommodation requirement that employers often overlook; *i.e.*, the requirement to consider reassigning a disabled individual to another position for which he or she is qualified in the event the person is no longer able to perform the duties of the current position because of the disability.

VI

ISOLATED REMARKS ABOUT AN EMPLOYEE'S "CHEEKS" NOT SEXUAL HARASSMENT

As noted in the following case, verbal or physical conduct of a sexual nature,

even if unwelcome, may not constitute sexual harassment if the conduct is not severe or pervasive.

The complainant, a Licensed Practical Nurse, filed a sexual harassment complaint alleging that a male Registered Nurse (RN) on her ward had created an abusive and hostile environment. Specifically, she accused him of making three comments about her "cheeks". The first comment, she later conceded, was probably a reference to her facial cheeks. She claimed that the second and third comments, however, were undeniable references to the size of her buttock, and one of those comments was made in the presence of a patient. She testified that she told the RN that his comments on this subject were unwelcome. The RN admitted making one comment in the presence of both the complainant and a patient which referenced the complainant's buttock.

Given these facts, OEDCA ruled that the RN's conduct, although certainly inappropriate and unprofessional, did not rise to level of "sexual harassment" within the meaning of Title VII of *The Civil Rights Act*. To constitute a Title VII violation the conduct, in addition to being unwelcome and relating to sex, must be so severe or pervasive as to affect a term or condition of employment, or has the purpose or effect of unreasonably interfering with the complainant's work performance and/or creating an intimidating, hostile, or offensive work environment.

OEDCA concluded that one or even a few isolated comments such as those at issue do not constitute conduct that is so severe or pervasive as to create an abusive or hostile environment. This is true even though the comments were unwelcome and made the complainant feel uncomfortable. The courts and the EEOC have stated that Title VII is not a civility code, and that isolated instances of bad or immature behavior of a sexual nature are generally not enough to establish sexual harassment.

Managers and supervisors should be careful not to draw the wrong lesson from this case. Behavior such as this, although technically not in violation of Title VII, should <u>never</u> be ignored. It constitutes, at the very least, misconduct and, if allowed to continue, could eventually rise to the level of sexual harassment.

Supervisors and managers can and should take prompt, appropriate, and effective action to address such conduct, even when the conduct, up to that point, does not yet fall within the legal definition of sexual harassment. Failure to take such action immediately upon learning of the conduct could form the basis for a finding of liability in the future if the conduct were to continue. In other words, it might be too late down the road to escape liability for sexual harassment if management officials delayed corrective action because they believed the prior conduct was not serious or pervasive enough to constitute sexual

harassment in the legal sense.

VII

PROCEDURAL DISMISSAL OF HARASSMENT CLAIM UPHELD BY EEOC

As the following case illustrates, harassment claims are sometimes dismissed procedurally – *i.e.,* without being investigated – because they simply "fail to state a claim" of harassment, as that term is legally defined.

A complainant filed a claim alleging harassment due to his national origin and age. In support of his claim, he cited seven incidents that occurred over a three-month period: (1) he was informed during a staff meeting that coworkers were complainant about the volume of the radio in his workstation, (2) his supervisor reminded him twice to load file folders on a cart, (3) his supervisors placed him in a "difficult situation" by requiring him to prioritize his work, (4) his supervisor verbally counseled him about time spent on assignments and informed him of accusations made against him by coworkers, (5) his supervisor gave him a written memo regarding time he spent on assignments, (6) a co-worker "with supervisory authority" questioned him about retirement and future plans, and (7) his request to switch to part-time status was denied.

It was clear from the written complaint that the complainant was extremely upset by these incidents. The threshold legal question, however, was whether the incidents alleged, when considered together and assumed to be true, were sufficient to state a claim of harassment. The VA's Office of Resolution Management concluded that they were not and procedurally dismissed the harassment claim without investigating it. The EEOC subsequently affirmed ORM's dismissal of that claim on appeal.

The EEOC agreed with the VA that the above incidents were isolated events, and were not so severe or pervasive as to create a hostile or abusive work environment. In determining whether an individual has alleged sufficient facts to state a claim of harassment, the EEOC looks at a number of factors, such as: (1) whether the conduct in question is verbal or physical, or both; (2) whether the conduct was repeated, and, if so, how frequently; (3) whether the conduct was hostile or patently offensive; (4) whether the alleged harasser was a supervisor or a coworker; (5) whether more than one person joined in the harassment; and (6) whether the harassment was directed at more than one individual. Evidence of the general working atmosphere involving employees other than the complainant is also relevant to the issue of whether a hostile work environment exists.

Notwithstanding the fact that the complainant's work situation was not to his liking, it is clear that his work environment was not abusive or hos-

tile. Hence, he failed to state a claim under the harassment theory of discrimination.

VIII

EEOC JUDGE CAUTIONS VA ABOUT FACILITY EEO MANAGERS "REPRESENTING" MANAGEMENT IN EEO PROCEEDINGS

Since 1998, EEO complaint processing in the VA has been the responsibility of the Office of Resolution Management (ORM). Previously, VA facility directors had functioned as "EEO Officers" at their facilities, and EEO counselors and EEO managers, who answered to those directors, were involved in processing EEO complaints.

After holding hearings into allegations of sexual harassment and abusive behavior by VA senior managers, the Congress had determined, among other things, that the VA's internal EEO complaint process was not sufficiently independent of local management. It found that senior officials at some facilities, sometimes with the assistance of their "EEO manager", occasionally acted in ways to thwart rather than support that process. Moreover, it found that employees frequently perceived local EEO personnel as tools of management rather than as neutral and objective fact-finders and problem-solvers.

The following recent case illustrates why it is still necessary to have an independent organization such as ORM manage the Department's EEO complaint process.

An employee at a VA medical center filed a retaliation complaint concerning a directed reassignment. ORM employees first provided the complainant informal counseling, and later accepted and investigated the formal complaint. Upon completion of the investigation, the complainant requested a hearing before an EEOC administrative judge. At the conclusion of the hearing the judge issued a decision in the VA's favor, finding no evidence of retaliatory intent.

In her decision, however, the judge cautioned the VA that it must at all times avoid even the appearance of impropriety. She noted that during the investigation, the RMO had summoned his EEO manager to be at his side during his telephonic affidavit. When the manager arrived and announced her presence, the investigator asked her whom she was representing. The manager replied that she was there "to address the issues that [the RMO] is being asked." The investigator instructed the EEO manager that she was not to answer questions or otherwise interfere with the investigation. The EEO manager complied with that instruction.

Nevertheless, the EEOC judge noted that it was the EEO manager's responsibility to advise the RMO at that point that she was not there as his

"representative", because such a role would constitute a clear conflict of interest. By failing to do so, she conveyed an unclear message to both the witness and the complainant regarding her role as an EEO manager at that facility.

Because of the EEO manager's lack of understanding, or at a minimum, her lack of sensitivity to what her proper role was during the investigation, the EEOC judge ordered the Department to provide training on this point to the EEO manager and her staff at the facility.

This case highlights the problem that existed prior to 1998, when ORM came into existence. Senior management officials occasionally used EEO personnel subordinate to them to help them defeat EEO complaints, a role clearly incompatible with their job description. That may not have been the RMO's intent here in requesting the EEO manager's presence during his affidavit, but unfortunately that was probably the impression conveyed to the complainant.

Likewise, the EEO manager may not have intended to convey the impression that she was representing the RMO, but she failed, for whatever reason – fear of displeasing the RMO or just plain negligence – to correct that impression on the record.

To ensure the integrity of the EEO complaint process in the VA, the Congress removed all EEO complaint processing personnel and responsibilities from local facilities. This case is a reminder of why that was and still is a good idea.

IX

(The following guidance recently provided by the Equal Employment Opportunity Commission (EEOC) may be of particular interest to managers and supervisors employed by the Veterans Canteen Service and the Dietetic Service)

HOW TO COMPLY WITH "THE AMERICANS WITH DISABILITIES ACT": A GUIDE FOR RESTAURANTS AND OTHER FOOD SERVICE EMPLOYERS

Background

The Equal Employment Opportunity Commission (EEOC) is frequently asked questions about whether restaurants and other food service employers risk violating the Americans with Disabilities Act (ADA) if they base employment decisions, such as whether to exclude an employee from the workplace, on local public health rules modeled on the Food and Drug Administration's *Food Code*. The EEOC is issuing a Guide titled *How to Comply with the Americans with Disabilities Act*: *A Guide for Restaurants and Other Food Service Employers,* to assure employers that they can follow rules based on the *Food Code* and also comply with the ADA. The *Guide* also explains how the ADA applies to food service employers and people with disabilities who work in restaurants.

The Americans with Disabilities Act (ADA) is a federal civil rights law that applies to people with disabilities and protects them from discrimination. EEOC, a Federal government agency, enforces the sections of the ADA that prohibit employment discrimination.

The *Food Code* is a model code developed by the Food and Drug Administration (FDA). The *Food Code* provides guidance on health issues for the food service industry. The FDA strongly encourages adoption of the *Food Code* by local, state, and federal governmental jurisdictions. The *Guide* is written in question/answer format and has three parts. The complete *Guide* is available at: *http://www.eeoc.gov/facts/restaurant_guide.html*. The following summary provides a brief overview of the Guide.

Part 1: Basic ADA information

Part 1 of the Guide is designed to answer basic questions about the ADA and whom it protects. In short:

The ADA protects qualified persons with disabilities.

A person must have a serious, long-term medical condition or disorder that makes it very difficult for him or her to do basic activities.

The person also must be qualified to perform the job. This means that the person must have the education, experience, or skills necessary to do the job AND must be able to perform the duties that are central to the job, with or without a reasonable accommodation.

A reasonable accommodation is a change in the application process, in the way a job is performed, or to other parts of the job (like training or benefits) that allows a person with a disability to have equal employment opportunities.

Employers must provide reasonable accommodations to qualified employees and applicants with disabilities, unless the accommodation would impose an undue hardship on their business.
Undue hardship means a significant difficulty or expense.

Part 2: The ADA and the FDA Food Code

Part 2 of the Guide answers questions about the FDA's *Food Code* and the requirements of the ADA.

Under the ADA, the Centers for Disease Control and Prevention (CDC) must annually publish a list of infectious and communicable diseases. The list is made up of pathogens, such as viruses and other microorganisms, which are substances that cause diseases. The ADA has special rules for people who have diseases due to the pathogens on the CDC list.

The FDA *Food Code* addresses the issue of employee health for those employees who work around food. One of

the Food Code's intentions is to protect the public from diseases transmissible through food. The 2001 *Food Code* discusses four pathogens included on the CDC list: Salmonella Typhi, Shigella spp, Shiga toxin-producing Escherichia coli, and Hepatitis A virus. These pathogens are called the Big 4. They are easily transmissible through food.

The FDA *Food Code* states that employees diagnosed with a disease due to one of the Big 4 pathogens should be excluded from the food establishment. The FDA *Food Code* also states that employees with certain symptoms (diarrhea, fever, vomiting, jaundice, or sore throat with fever) should be restricted from certain duties, including food handling.

Most people who have a disease due to one of the Big 4 pathogens are not disabled by that disease. Diseases caused by the Big 4 pathogens are usually short-term and/or minor. It is even more unlikely that people who only have a symptom listed in the *Food Code*, but who have not been diagnosed with a disease, would have an ADA disability due to the symptom alone.

But, if a person is disabled by one of the diseases caused by a Big 4 pathogen, the employer must consider the ADA in addition to the provisions in the FDA *Food Code*. The ADA says that an employer may refuse to assign or continue to assign an employee to a food handling position if the employee is disabled by one of the diseases on the CDC list and the risk of transmitting the disease cannot be eliminated by a reasonable accommodation.

This means that when an employee claims to be disabled by one of the diseases listed in the *Food Code* and requests reasonable accommodation, you must follow these steps:

If the employee is disabled by one of the diseases listed in the *Food Code*, you may follow the *Food Code's* guidance that the employee be excluded from the food establishment only if you determine that:

- there is no reasonable accommodation that would eliminate the risk of transmitting the disease while allowing the employee to remain in her food handling position; or

- all reasonable accommodations are too difficult or expensive and there is no vacant position not involving food handling to which the employee can be reassigned.

The ADA also has rules about when employers may ask applicants and employees questions about their health, including questions about diseases transmissible through food.

No medical questions may be asked of applicants until a conditional offer of employment has been made. Once a conditional job offer is made, employ-

ers may ask medical questions and require medical exams, as long as employers treat all applicants for the same type of job the same. Questions 13-19 in Part 3 of the Guide explain other ADA rules about asking applicants medical questions.

Employers may ask current employees medical questions only when there are concrete reasons to believe that the employee cannot perform the job or poses a risk to workplace safety due to a medical condition. The ADA also allows employers to require current employees to follow the *Food Code's* guidance on reporting certain situations relating to health, such as if they have certain diseases transmissible through food. This rule is spelled out in question 9 of the Guide.

Part 3: ADA rules prohibiting discrimination against people with disabilities

Part 3 of the Guide focuses on ADA rules that prohibit employment discrimination against qualified people with disabilities.

Providing Reasonable Accommodation

There are many different types of reasonable accommodations, including: providing special equipment, removing minor tasks from a particular job, allowing time off, and reassigning an employee to a different job. Other examples of reasonable accommodations are provided in question 27.

A request for a reasonable accommodation does not need to be written or include any special words. A request can be made by the applicant/employee, or by a doctor, relative, or other representative.

If an employer decides that a requested reasonable accommodation would be too difficult or expensive, it must figure out if there is a different accommodation that would not be an undue hardship.

The FDA *Food Code* prohibits the handling of animals, but it allows employees to use service animals. If an employee asks to use a service animal as a reasonable accommodation, the employer must figure out if allowing the use of the service animal would be an undue hardship or pose a significant risk of substantial harm to the employee or others in the workplace.

Performance and Conduct

An employer does not have to excuse poor job performance or misconduct, even if the performance or conduct is related to a person's disability. The employer should treat all employees who perform poorly or violate conduct rules the same.

Teasing that is based on someone's disability and is unwelcome, serious, and/or repeated, is illegal harassment. When the EEOC investigates complaints of harassment, it looks at the

steps an employer took to prevent or eliminate the behavior.

Charges Against Employers

A complaint or a "charge" of discrimination means that someone thinks that an employer discriminated against her for reasons that are not legal under Federal equal employment opportunity law: disability, or race, color, national origin, religion, sex or age.

The ADA prohibits retaliation against people who file complaints of discrimination or complain about behavior they think is discriminatory. For example, an employer violates the ADA if it fires (or takes other negative action against) someone for filing a charge, requesting a reasonable accommodation, acting as a witness in a co-worker's discrimination charge, or signing a petition protesting a hiring practice he thinks is discriminatory.

(A more in-depth discussion of this topic is found in the EEOC's complete Guide. See: http://www.eeoc.gov/facts/restaurant_guide.html.)